

Appellate Case No. 59211-4

8/873-8

COURT OF APPEALS,
DIVISION I OF THE STATE OF WASHINGTON

SANDRA LAKE,

Appellant

v.

WOODCREEK HOMEOWNERS ASSOCIATION,
a Washington homeowners association;
and GLEN R. CLAUSING, a single man,

Respondent.

APPELLANT'S SUPPLEMENT TO OPENING BRIEF

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**I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING
TO ASSIGNMENTS OF ERROR REGARDING FINDINGS
OF FACT AND CONCLUSIONS OF LAW REGARDING
ATTORNEY'S FEES**

A. Assignments Of Error

1. Ms. Lake assigns error to Findings of Fact Nos. 3 and 4 and Conclusions of Law Nos. 2 and 3. The trial court erred by concluding as a matter of law that this is an "appropriate" case under RCW 64.34.455 and abused its discretion by awarding Mr. Clausing attorney fees.

2. Ms. Lake assigns error to Findings of Fact Nos. 6, 7, 8, and 9 and Conclusions of Law Nos. 4 and 5. The trial court abused its discretion by awarding Glen Clausing attorney fees for work performed by him personally.

B. Issues Pertaining To Assignments Of Error

1. Issue related to Assignments of Error Nos. 1 and 2: Whether the trial court properly determined that this is an "appropriate" case under RCW 64.34.455 and granted Glen Clausing attorney's fees.

2. Issue related to Assignment of Error No. 2: Whether the court properly awarded attorney's fees to Glen Clausing for his personal work when he did not appear as counsel of record.

3. Also related to Assignment of Error No. 2: Whether the trial court entered Findings of Fact and Conclusions of Law sufficient for appellate review.

II. SUPPLEMENT TO STATEMENT OF THE CASE

The trial court entered an order granting attorney fees to Mr. Clausing but did not enter Findings of Fact and Conclusions of Law in support of the order. (CP 990-92.) After Ms. Lake pointed out in her opening brief on appeal that no Findings of Fact and Conclusions of Law had been entered, Mr. Clausing requested that the trial court make such entry, which it did. (CP 1009-1013.)

III. SUPPLEMENTAL ARGUMENT

A. Standard of Review

A trial court's decision granting attorney fees is reviewed for abuse of discretion. *Eagle Point Condominium Owners Association v. Coy*, 102 Wn. App. 697, 715, 9 P.3d 898 (2000).

B. This is not an "appropriate" case to grant attorney fees under RCW 64.34.455.

See Ms. Lake's argument at pages 46-47 of her opening brief.

C. The trial court abused its discretion by awarding Glen Clausing attorney's fees for work he performed personally.

The trial court awarded fees to Mr. Clausing for time he personally spent preparing and defending his case. Although Mr. Clausing is a licensed attorney, he did not represent himself and he is not an attorney of record in this case. The trial court's Findings of Fact and Conclusions of Law state,

[Finding of Fact No.] 7. Clausing claimed the amount of \$57,286.25 in attorneys' fees of which Watts' portion was \$8,288.75. The Court finds that Watts' portion of the attorneys' fees was reasonable and necessarily incurred in the defense of the Lake Complaint on behalf of Mr. Clausing. The Court finds the sum of \$30,000 represents a reasonable and appropriate and necessary compensation for Clausing's legal fees incurred by him in defense of the Lake litigation **as assistant to Mr. Watts.** ...

[Finding of Fact No.] 8. It is entirely appropriate for Mr. Clausing to charge for his services reasonably and necessarily incurred in assisting his retained counsel in defending himself in this litigation. ...

(CP 1111 (emphasis added).) These findings and the related findings and conclusions are error.

Parties are generally expected to assist in the prosecution or defense of their case but they are not granted attorney fees for their time. The fact that Mr. Clausing is an attorney, whose primary area of practice is real estate transaction law, does not place him in a special position in relation to other types of parties generally or the parties in this case such that he is entitled to fees for his personal time. If Ms. Lake becomes the

prevailing party in this case, should Ms. Lake, or her attorney life partner, be entitled to fees for the time they spent assisting her retained counsel in the prosecution of her claim? There is no authority that would permit fees for their time.

Mr. Clausing did not enter a notice of appearance or make any representations that he was representing himself. Because he did not represent himself he could not be contacted directly by counsel for Ms. Lake or Woodcreek. *See* RPC 4.2. And, by not filing a notice of appearance, there was no notice to any of the parties that he would be seeking fees for his time. Attorney fees are granted to, in part, “to punish frivolous litigation and to encourage meritorious litigation.” *Eagle Point*, 102 Wn. App. at 713 (analyzing RCW 64.34.455); *see also e.g. Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 788-789, 733 P.2d 960 (1987) (purpose of RCW 4.84.250 [another attorney fee statute] is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims). To accomplish this purpose the party who is to be encouraged or punished for bringing suit would need to be aware of the potential amount of fees for which they may be liable as the litigation proceeds. The law acknowledges that attorney fees are taken into account when parties consider settlement against the costs of litigation. *See e.g. Beckmann*, 107 Wn.2d at 788-789 (purpose of notice of claim amount

required under RCW 4.84.250 in certain cases is to notify the parties that they ought to settle or risk paying attorney's fees); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 673, 15 P.3d 115 (2000) (settlement purchases parties "certainty by avoiding the risks of an adverse trial outcome--not to mention forgoing the expenses associated with a lengthy trial and appeal ... [they pay for] a release from an unquantifiable basket of risks and considerations"); *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 533-534, 128 P.3d 128 (2006) (if the plaintiff accepts a settlement offer under Civil Rule 68, the defendant pays the plaintiff's attorney fees and costs to the date of the offer but if the plaintiff rejects the offer, it must win a judgment in excess of the amount of the offer in order to recover any costs or fees); RCW 8.25.070(1) (attorney fees to be awarded to condemnee if trial occurs and condemnor did not make settlement offer thirty days prior to trial). A notice of appearance from the representing counsel not only provides notice that a party is represented and that service should be sent to that counsel, but notifies the parties of the reputation, level of competence and expertise, as well as, generally, the cost of fees that will be incurred based on these factors. When an attorney seeks to recover fees for his own time failure to file a notice of appearance is significant. Finally, there is no authority supporting an award of

attorney fees to a party who assisted in his defense but did not represent himself because the party himself is an attorney. The trial court's award of fees for Mr. Clausing's time should be overturned.

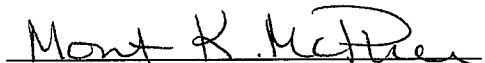
D. The Findings of Fact and Conclusions of Law are not adequate to permit appellate review.

"Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record." *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). The court's order granting attorney fees to Mr. Clausing grants \$30,000 in attorney's fees without differentiating between fees billed for Mr. Watts's time and those for Mr. Clausing's. (CP 990-92.) The Findings of Fact and Conclusions of Law entered in support of the court's order are confusing and suggest that the court's order granting fees of \$30,000 are only for fees incurred for Mr. Clausing's time. Specifically, Finding of Fact No. 7 states, "... the sum of \$30,000 represents a reasonable and appropriate and necessary compensation for Clausing's legal fees incurred by him in defense of the Lake litigation **as assistant to** Mr. Watts. ..." (CP 1111 (emphasis added).) Conclusion of Law No. 4 states, "Reasonably and necessarily incurred by Clausing in connection with the defense of the Lake litigation through entry of summary judgment and the attorneys' fees motions in the

Superior Court litigation is the sum of \$30,000, together with the sum of \$1,783.45 for costs.” (CP 1112.) Under the court’s order it appears that the \$30,000 in fees is the total amount of attorney fees, for both Mr. Watts and Mr. Clausing, granted. Under the Findings of Fact and Conclusions of Law it appears that \$30,000 is granted to cover Mr. Clausing’s work and Mr. Watts’s fees are not addressed. Because the trial court’s basis for the award is unclear, these Findings of Fact and Conclusions of Law do not meet the standard required for appellate review.

RESPECTFULLY SUBMITTED this 16th day of August, 2007.

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